



November 17, 2020

Via ECF

The Honorable Stewart D. Aaron,
 United States Magistrate Judge,
 Daniel Patrick Moynihan United States Courthouse,
 500 Pearl Street,
 New York, New York 10007.

Re: *Allianz Global Invs. GmbH, et al. v. Bank of Am. Corp., et al.*,
 Case No. 18-cv-10364

Dear Judge Aaron:

Under Rule II(B) of Your Honor's Individual Practices, we write on behalf of Defendants¹ in the above-referenced action ("Defendants") to submit this motion for a discovery conference and a protective order. Specifically, we seek this Court's urgent intervention regarding Plaintiffs' retention of Jason Katz, a former Barclays and BNP trader and a likely fact witness in this Action, as a paid "consulting" expert. In a parallel action in the U.K. brought by the same Plaintiffs and Plaintiffs' counsel as in the above-referenced action ("Action"), Plaintiffs have applied to give Katz—in the guise of being a paid "consultant"—access to the confidential and highly confidential information that certain Defendants have produced in this Action and the U.K. action. Paying money to, and sharing confidential information with, a fact witness raises serious administration of justice issues. Over the past few days, Defendants have tried to get basic information from Plaintiffs about Katz's retention. Yesterday, Plaintiffs finally revealed that they have agreed to pay Katz, who is otherwise currently unemployed, \$400 per hour for his purported consulting services. Rather than allowing the parties time to discuss these serious concerns, Plaintiffs are seeking to make the whole issue a *fait accompli* by rushing an application in the U.K. court to share confidential information with Katz and were unable to speak with Defendants until this afternoon.² Accordingly, to avoid tainting a crucial fact witness, Defendants request this Court to order Plaintiffs not to pay Katz the unreasonable amount of \$400 per hour and not to share any information to which he would not have had access while employed as an FX trader.³

Background. Katz is a former FX trader for Barclays and BNP who participated in certain FX chat rooms that are at issue in this Action. On January 4, 2017, Katz pleaded guilty to a one-count indictment for violating the Sherman Act. (Plea Agreement at ¶ 1, *U.S. v. Katz*, No. 17-cr-0003, Dkt. No. 6 (S.D.N.Y. Jan. 4, 2017).) Katz testified as a fact witness for multiple days in *U.S. v. Aiyer*, No. 18-cr-333 (S.D.N.Y.)—a criminal case

¹ The MUFG and Credit Suisse defendants do not join this letter.

² On November 17, 2020, the parties met and conferred for approximately 25 minutes by telephone. Dan Brockett and Anthony Alden from Quinn Emanuel Urquhart & Sullivan LLP participated for Plaintiffs while Matthew Schwartz and Jacob Lieberman of Sullivan & Cromwell LLP and Laura Hall from Allen & Overy LLP participated for Defendants. The parties are at impasse on the propriety of Plaintiffs' arrangement with Katz and whether they should be allowed to show Katz documents that he never sent or received.

³ Defendants do not seek to prevent Plaintiffs from otherwise speaking to Katz, assuming he does not divulge any privileged or otherwise protected information, including information he is required to keep confidential pursuant to the terms of his employment with BNP.

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involving Katz that is detailed in the Third Amended Complaint. (See Dkt. No. 475, ¶¶ 293-96.)⁴ Plaintiffs and BNP listed Katz in their Initial Disclosures as a person that they “may use to support [their] claims or defenses.” Fed. R. Civ. P. 26(a)(1)(A)(i). Plaintiffs also demanded that Barclays and BNP include Katz as a document custodian. And, Katz is being scheduled for a fact-witness deposition in the main FX class action, *In re FOREX Antitrust Litig.*, No. 13-cv-7789 (S.D.N.Y.), where his testimony also may be used in this Action.

Defendants first learned of Plaintiffs’ purported retention of Katz by happenstance on November 6, 2020, when the claimants in the parallel U.K. action sought defendants’ consent to show Katz confidential materials. Barclays and others promptly objected and sought further information about the arrangement with Katz from Plaintiffs in the U.S. and the U.K. Plaintiffs have stated that they intend to not only share Confidential and Highly Confidential information with Katz in both this Action and in the U.K., but also to compensate him as a “consultant” for assisting Plaintiffs in preparing their case at \$400 per hour. (Ex. A at 2; Ex. B at 1.) Barclays asked Plaintiffs to refrain from sharing with Katz any Confidential or Highly Confidential information until Defendants in this Action could learn more about Katz’s purported retention. In response, U.K. Plaintiffs filed an application with the U.K. court to allow them to immediately divulge information to Katz and have refused to stay that application pending discussions in the U.S.

Plaintiffs Admit Hiring Katz for His Personal Knowledge of Relevant Facts.

There can be no dispute that Katz is a fact witness and that Plaintiffs are retaining him because of his personal knowledge of relevant facts. Plaintiffs have admitted this: on November 12, Plaintiffs explained that their “purpose” for hiring Katz as consultant was, in part, his “knowledge of facts relevant to the alleged conspiracy.” (Ex. C at 2.) Earlier that day in the U.K., Plaintiffs’ counsel asserted that they had retained him as a “consultant” because of “[t]he very fact that Mr. Katz was an employee of Barclays and engaged in the unlawful conduct that is the subject of the [U.K.] claim.” (Ex. D at 1.) Plaintiffs ignore that there are literally hundreds of other current and former FX traders, including among Plaintiffs’ own employees, who are not fact witnesses and could provide the same services.

Plaintiffs’ Arrangement to Pay Katz \$400 Per Hour Is Improper. It is well-settled that a lawyer can only “advance, guarantee or acquiesce in the payment of . . . reasonable compensation to a [fact] witness for the *loss of time* in attending, testifying, preparing to testify or otherwise assisting counsel, and reasonable related expenses,” *Caldwell v. Cablevision Sys. Corp.*, 86 A.D.3d 46, 51 (N.Y. App. Div., 2d Dep’t. 2011) (emphasis added) (quoting N.Y. R. of Prof. Conduct 3.4(b)).⁵ “Payment to a fact witness which bears no relation to the witness’s reasonable losses . . . is nothing more than a fee for testifying that permits strangers to the litigation to profit from it.” *Id.* at 52 (internal quotations and alterations omitted). After multiple requests, on November 16, Plaintiffs finally disclosed that they are going to pay Katz \$400 per hour for his services. Plaintiffs’ compensation arrangement with Katz is excessive by any reasonable measure. At his October 5

⁴ Aiyer has appealed his conviction and it is possible that his appeal could result in a retrial of his case.

⁵ Under the Federal Anti-Gratuity statute, 18 U.S.C. § 201(d), a lawyer can only pay a fact witness for the “reasonable cost of travel and subsistence incurred and the reasonable value of time lost.” *In re Complaint of PMD Enterprises Inc.*, 215 F. Supp. 2d 519, 530 (D.N.J. 2002).

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sentencing, Katz explained that he was “a full-time stay-at-home dad” who spent the “last few years learning about growing and building a small real estate business” and was “taking classes to become an EMT.” (Oct. 5, 2020 Tr., *U.S. v. Katz*, at 7:10-20.). The Rules of Professional Conduct make clear that a fact witness’s reimbursement for their “loss of time” should be based on the monetary value of that witness’s time and requires “closer consideration” if the witness is unemployed. (N.Y. Bar Ass’n, Op. 668 (1994).) Katz cannot credibly claim that his services are worth \$400 per hour to anybody other than Plaintiffs. Indeed, this hourly rate far exceeds what courts in this circuit have permitted in similar circumstances. *See, e.g., Prasad v. MML Inv’rs Servs., Inc.*, 2004 WL 1151735, at *7 (S.D.N.Y. May 24, 2004) (\$125 per hour and citing case that concluded rates between \$125-200 per hour were reasonable); *Klorczyk v. Sears, Roebuck & Co.*, 2017 WL 3272237, at *3 (D. Conn. Aug. 1, 2017) (\$120 per hour); *Rajaratnam v. Motley Rice, LLC*, 449 F. Supp. 3d 45, 78 (E.D.N.Y. 2020) (less than \$8,500 per year, including expenses for international travel).⁶ Nor can Plaintiffs avoid the prohibitions on improperly paying a fact witness by dressing him up as a purported “consultant.” *See Patel v. 7-Eleven Inc.*, 2015 WL 9701133, at *4-5 (C.D. Cal. Apr. 14, 2015) (holding compensation was improper because the witness was “actually hired . . . for his unique factual insight into the workings of Defendants’ [business], not for his ‘expertise’” in the relevant field).

Plaintiffs Should Not Be Allowed to Taint Katz’s Knowledge as a Fact Witness. Plaintiffs clearly intend to show Katz documents that have been designated Confidential and Highly Confidential for which he was not an author or recipient. Indeed, they have filed a motion to permit this in the U.K. Allowing Katz “to review all tiers of confidential information in the case” runs the risk of “interfering with the recollections of a key fact witness” and should not be allowed. *Arconic Inc. v. Novelis Inc.*, 2018 WL 5660180, at *1-*2 (W.D. Pa. Aug. 3, 2018) (“[I]t is essential to avoid the possibility of influencing the testimony of a witness whom both parties agree is a central fact witness in the case.”). If Katz reviews documents that are unrelated to his conduct, it will necessarily change his personal understanding of the conduct at issue in the Action. This cannot be mitigated with cross-examination, in part because Plaintiffs have stated that they will invoke “[their] work product privilege over communications with Katz concerning the subject of the consulting.” (Ex. A at 2.) *Cf. In re Complaint of PMD Enterprises Inc.*, 215 F. Supp. 2d at 531 (holding cross-examination was insufficient where the party “engaged in *ex parte* contact and offered to pay an adverse fact witness a substantial sum to review certain documents”). Defendants object to and reserve all rights to challenge any such claim.⁷

For the foregoing reasons, Defendants respectfully request that the Court order Plaintiffs not to share any confidential information with Katz that he would not have had access to while employed as an FX trader and not to pay him excessive compensation.

⁶ Plaintiffs will no doubt claim that Katz’s experience as a trader justifies paying him so much, but this ignores that Katz was banned for life from working as a trader by the Federal Reserve in 2017. *See* <https://www.federalreserve.gov/newsevents/pressreleases/files/enf20170104a1.pdf>.

⁷ Moreover, under the Amended Order of Confidentiality, a fact witness—but not a consulting “expert”—can only see “Highly Confidential” information to which the witness had access “in the normal course of business.” (*Compare* Dkt. No. 388 ¶ 7.2(f) *with* ¶ 7.2(h).) Plaintiffs should not be allowed to sidestep this Order by virtue of paying Katz as a consultant.

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Respectfully Submitted,

SULLIVAN & CROMWELL LLP

By: /s/ Matthew A. Schwartz

Matthew A. Schwartz
Matthew A. Peller
Jacob B. Lieberman
Nikolai Krylov
Maeghan O. Mikorski
125 Broad Street
New York, New York 10004
Telephone: (212) 558-4000
schwartzmatthew@sullcrom.com
peller@sullcrom.com
liebermanj@sullcrom.com
krylovn@sullcrom.com
mikorskim@sullcrom.com

*Attorneys for Defendants Barclays Bank plc,
Barclays plc and Barclays Capital Inc.*

ALLEN & OVERY LLP

By: /s/ David C. Esseks

David C. Esseks
Laura R. Hall
Rebecca Delfiner
1221 Avenue of the Americas
New York, New York 10020
Telephone: (212) 610-6300
david.esseks@allenoverly.com
laura.hall@allenoverly.com
rebecca.delfiner@allenoverly.com

PATTERSON, BELKNAP, WEBB & TYLER
LLP

By: /s/ Alejandro H. Cruz

Joshua A. Goldberg
Alejandro H. Cruz
Camille L. Fletcher
Patterson, Belknapp, Webb & Tyler LLP
1133 Avenue of the Americas
New York, NY 10036
Telephone: (212) 336-2000
acruz@pbwt.com
cfletcher@pbwt.com
jgoldberg@pbwt.com

*Attorneys for Defendants BNP Paribas Group,
BNP Paribas USA, Inc., BNP Paribas S.A. and
BNP Paribas Securities Corp.⁸*

ENDORSEMENT: Defendants' Letter Motion is DENIED WITHOUT PREJUDICE. Defendants' Letter Motion in substance is seeking a temporary restraining order, and a Letter Motion seeking a discovery conference under my Individual Rules is not a procedurally proper way to seek such relief. Moreover, such relief appears to me to be outside my jurisdiction. *See* 28 U.S.C. § 636(b)(1)(A). Nevertheless, the Court expects Plaintiffs to abide by the letter and spirit of the Amended Order of Confidentiality (ECF No. 388), as well as their ethical obligations. SO ORDERED.

Dated: 11/18/2020



⁸ Allen & Overy LLP does not represent Defendants BNP Paribas Group, BNP Paribas USA, Inc., BNP Paribas S.A. and BNP Paribas Securities Corp. with respect to claims by Claimants affiliated with BlackRock, Inc.

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SHEARMAN & STERLING LLP

By: /s/ Adam S. Hakki
Adam S. Hakki
Richard F. Schwed
Jeffrey J. Resetarits
599 Lexington Avenue
New York, New York 10022
Telephone: (212) 848-4000
ahakki@shearman.com
rschwed@shearman.com
jeffrey.resetarits@shearman.com

*Attorneys for Defendants Bank of America
Corporation, Bank of America, N.A. and Merrill
Lynch, Pierce, Fenner & Smith Incorporated*

COVINGTON & BURLING LLP

By: /s/ Andrew A. Ruffino
Andrew A. Ruffino
620 Eighth Avenue
New York, NY 10018-1405
Telephone: (212) 841-1000
aruffino@cov.com

Andrew D. Lazerow (pro hac vice motion
forthcoming)
850 10th Street NW
Washington, DC 20001
Telephone: (202) 662-5081
alazerow@cov.com

*Attorneys for Defendants Citigroup, Inc.,
Citibank, N.A., Citigroup Global Markets, Inc.*

LATHAM & WATKINS LLP

By: /s/ Joseph Serino, Jr.
Joseph Serino, Jr.
885 Third Avenue
New York, New York 10022
Telephone: (212) 906-1717
joseph.serino@lw.com

KING & SPALDING LLP

By: /s/ G. Patrick Montgomery
G. Patrick Montgomery (admitted pro hac vice)
1700 Pennsylvania Ave., NW
Washington, DC 20006
Telephone: (202) 626-5444
pmontgomery@kslaw.com

*Attorneys for Defendants Deutsche Bank AG and
Deutsche Bank Securities Inc.*

CLEARY GOTTlieb STEEN &
HAMILTON LLP

By: /s/ Thomas J. Moloney
Thomas J. Moloney
Rishi N. Zutshi
One Liberty Plaza
New York, New York 10006
Telephone: (212) 225-2000
tmoloney@cgsh.com
rzutshi@cgsh.com

*Attorneys for Defendants The Goldman
Sachs Group, Inc. and Goldman Sachs &
Co. LLC*

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LOCKE LORD LLP

By: /s/ Gregory T. Casamento

Gregory T. Casamento
3 World Financial Center
New York, New York 10281
Telephone: (212) 812-8325
gcasamento@lockelord.com

Roger B. Cowie
2200 Ross Avenue, Suite 2200
Dallas, TX 75201
Telephone: (214) 740-8000
rcowie@lockelord.com

J. Matthew Goodin
Julia C. Webb
111 South Wacker Drive
Chicago, IL 60606
Telephone: (312) 443-0700
jmgoodin@lockelord.com
jwebb@lockelord.com

*Attorneys for Defendants HSBC Bank plc, HSBC
North America Holdings, Inc., HSBC Bank USA,
N.A., and HSBC Securities (USA) Inc.*

DONTZIN NAGY & FLEISSIG LLP

By: /s/ Tibor L. Nagy, Jr.

Tibor L. Nagy, Jr.
Jason A. Kolbe
Dontzin Nagy & Fleissig LLP
980 Madison Avenue
New York, NY 10075
Telephone: (212) 717-2900
tnagy@dnflp.com
jkolbe@dnflp.com

SKADDEN, ARPS, SLATE, MEAGHER &
FLOM LLP

By: /s/ Boris Bershteyn

Boris Bershteyn
Peter S. Julian
Tansy Woan
One Manhattan West
New York, New York 10001
Telephone: (212) 735-3000
boris.bershteyn@skadden.com
peter.julian@skadden.com
tansy.woan@skadden.com

Gretchen Wolf (admitted *pro hac vice*)
155 N. Wacker Dr., Suite 2700
Chicago, Illinois 60606
Telephone: (312) 407-0956
gretchen.wolf@skadden.com

Paul M. Kerlin (admitted *pro hac vice*)
1440 New York Avenue N.W.
Washington, DC 20005
Telephone: (202) 371-7000
paul.kerlin@skadden.com
*Attorneys for Defendants JPMorgan Chase &
Co., JPMorgan Chase Bank, N.A. and J.P.
Morgan Securities LLC⁹*

⁹ Skadden, Arps, Slate, Meagher & Flom LLP does not represent JPMorgan Chase & Co., JPMorgan Chase Bank, N.A. and J.P. Morgan Securities LLC with respect to claims by BlackRock, Inc. or BlackRock-related entities listed in Appendix C of the complaint.

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WACHTELL, LIPTON, ROSEN & KATZ

By: /s/ Jonathan M. Moses
Jonathan M. Moses
Justin L. Brooke
51 West 52nd Street
New York, New York 10019
Telephone: (212) 403-1000
JMMoses@wlrk.com
JLBrooke@wlrk.com

*Attorneys for Defendants Morgan Stanley,
Morgan Stanley & Co., LLC, and Morgan
Stanley & Co. International plc*

MOORE AND VAN ALLEN PLLC

By: /s/ James P. McLoughlin, Jr.
James P. McLoughlin, Jr.
Mark A. Nebrig
Joshua D. Lanning
Moore & Van Allen PLLC
100 N. Tryon Street, Suite 4700
Charlotte, North Carolina 28202
Telephone: (704) 331-1000
jimmcloughlin@mvalaw.com
marknebrig@mvalaw.com
joshlanning@mvalaw.com

*Attorneys for The Royal Bank of Canada and
Defendant RBC Capital Markets LLC on behalf
of RBC Capital Markets LLC*

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DAVIS POLK & WARDWELL LLP

By: /s/ Paul S. Mishkin
Paul S. Mishkin
Adam G. Mehes
Maude Paquin
450 Lexington Avenue
New York, New York 10017
Telephone: (212) 450-4000
paul.mishkin@davispolk.com
adam.mehes@davispolk.com
maude.paquin@davispolk.com

*Attorneys for Defendants The Royal Bank of
Scotland plc and NatWest Markets Securities
Inc.*

LINKLATERS LLP

By: /s/ James R. Warnot, Jr.
James R. Warnot, Jr.
Patrick C. Ashby
Nicole E. Jerry
1290 Avenue of the Americas
New York, New York 10104
Telephone: (212) 903-9000
james.warnot@linklaters.com
patrick.ashby@linklaters.com
nicole.jerry@linklaters.com

Adam S. Lurie
601 13th St. NW
Suite 400
Washington, DC 20005
Telephone: (202) 654-9227
adam.lurie@linklaters.com

MAYER BROWN LLP

By: /s/ Steven Wolowitz
Steven Wolowitz
Henninger S. Bullock
Andrew J. Calica
Victoria D. Whitney
1221 Avenue of the Americas
New York, New York 10020-1001
Telephone: (212) 506-2500
swolowitz@mayerbrown.com
hbullock@mayerbrown.com
acalica@mayerbrown.com
vwhitney@mayerbrown.com

Attorneys for Defendant Société Générale S.A.¹⁰

¹⁰ Linklaters LLP does not represent Société Générale with respect to claims by BlackRock, Inc. or the BlackRock-related entities listed in Appendix C of the Complaint.

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HOGAN LOVELLS US LLP

By: /s/ Marc J. Gottridge
Marc J. Gottridge
Lisa J. Fried
Benjamin A. Fleming
Charles Barrera Moore

390 Madison Avenue
New York, New York 10017
marc.gottridge@hoganlovells.com
lisa.fried@hoganlovells.com
benjamin.fleming@hoganlovells.com
charles.moore@hoganlovells.com

Telephone: (212) 918-3000

EVERSHEDS SUTHERLAND LLP

By: /s/ Lewis S. Wiener
Lewis S. Wiener
Ronald W. Zdrojeski
Meghana D. Shah
1114 Avenue of the Americas, 40th Floor
New York, New York 10036
Telephone: (212) 389-5000
lewiswiener@eversheds-sutherland.com
ronzdrojeski@eversheds-sutherland.com
meghanashah@eversheds-sutherland.com

Attorneys for Defendant Standard Chartered Bank¹¹

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Eric J. Stock
Eric J. Stock
200 Park Avenue
New York, New York 10166
Telephone: (212) 351-4000
estock@gibsondunn.com

Attorney for Defendants UBS AG and UBS Securities LLC

(Attachments)

cc: All counsel of record (via ECF)

¹¹ Eversheds Sutherland (US) LLP only represents Standard Chartered Bank with respect to claims by AllianzGI GmbH, the Allianz Entities, PIMCO, and the PIMCO Funds, all as defined in the Complaint.